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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

Nos. 220, 249

COMMON STOCKHOLDERS COMMITTEE OF LONG ISLAND LIGHTING COMPANY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, LONG ISLAND LIGHTING COMPANY, QUEENS BOROUGH GAS AND ELECTRIC COMPANY, NASSAU & SUFFOLK LIGHTING COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. DONALD HALSTED, E. M. NICHOLS and B. F. GRIZZLE as a Protective Committee for the Holders of the Common Stock of Long Island Lighting Company,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

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PETITIONERS' REPLY BRIEF

We have chosen to follow the example set by the Securities and Exchange Commission and serve a single reply brief in No. 220 and No. 249.

Replying to the Brief for Respondents Long Island Lighting Company, et al., in Nos. 220 and 221

This brief, after stating that the companies

> "adopt the views and arguments of the Securities and Exchange Commission expressed in its brief in opposition to the petitions for a writ of certiorari." (p. 3)

states that it is submitted "in order to bring to the Court's attention the serious financial problems of the System companies occasioned by the long and, in part, undue delay, in consummating the reorganization and consolidation which qualified administrative agencies have, after a detailed examination, found necessary in the public interest."

The remainder of the brief is devoted to an attack upon the common stockholders' motives.

The Company has neglected to point out to the Court that by stipulation (R. p. 406) both the Company and the Securities and Exchange Commission agreed that consummation of the reorganization would be deferred until after this Court's decision. Thus, the alleged delay caused by this application could, if the Companies' complaint is made in good faith, have been avoided by applying for an order of consummation and not stipulating to defer consummation until after decision of this application. The making of the stipulation is a conclusive admission by all parties thereto that serious questions exist which should be passed upon by this Court.

Replying to Brief of Respondent Committee of Preferred Stockholders of Long Island Lighting Company

Amazingly enough, this brief argues first that the 1944 recapitalization plan

> "never came into effect, and accordingly, any claim based thereon is totally synthetic. Moreover, in any event, the Securities and Exchange Commission has taken the claim into account in evaluating the common stockholders' 'bundle of rights', and the District Court and Court of Appeals have examined and approved the Commission's determination in that regard." (pp. 1 and 2)

By this statement the Preferred Stockholders' Committee has exposed one of the inherent vices in the determinations below. The brief argues first that the recapitalization never became effective and, therefore, is irrelevant in the determination of what the common stockholders should receive.

The Commission, in its decision, did not determine whether the 1944 recapitalization became effective. Upon the hypothesis that it did become effective, the Commission found that it would take about seven years for the preferred dividend arrearages to be made up (R. 233). Then, upon the hypothesis, that the 1944 recapitalization did not become effective, the Commission found that it would take approximately fourteen years for these arrearages to be made up (R. 234). Thus, without determining which of these hypotheses would govern the ultimate determination, it allotted 5.71% of the stock in the consolidated corporation to the common stockholders.

If the Preferred Stockholders' first argument is correct, that is, that the 1944 recapitalization never became effective, why did the Commission, in its opinion, use that hypothesis to measure what the common stockholders should receive? This use, of course, is completely at variance with, and in contradiction of, the Commission's present position which, as stated in its present brief (p. 19), is that

> "The Commission was free to disregard both the formal action taken by the Company after the commencement of the proceedings before this Commission and the reluctant consent given by the New York Commission (R. 394,867)."

If this was the position of the Commission upon its original determination, why did it not say so instead of testing the common stockholders' rights on the basis of both hypotheses?

The second point of the Preferred Stockholders' brief (p. 7) is that

> "The Securities and Exchange Commission fairly compromised the claim of the common stockholders based upon the 1944 recapitalization plan."

Even the Commission does not contend that it compromised this claim. It contends merely that it was "free to disregard" the 1944 recapitalization. If it argues that it is free to disregard it, presumably that is what the Commission did, otherwise there would be no point in making the argument.

The facts are, of course, that the Commission has never clearly, fairly, or specifically stated what it did. So far as examination of the decision and briefs can clarify this question, it would appear that the Commission did disregard the claim and endeavored to cloak its disregard in the obscurity created by the references in its original opinion (R. 233, 234) to the existence of the claim.

Replying to the Brief of Respondent Securities and Exchange Commission Submitted in Nos. 220 and 249

This brief is most remarkable for what it omits, rather than what it contains. It omits both fair statements and

relevant discussion of the specific contentions relied upon for the granting of the writs, and conceals the omissions by misstating our contentions, and then rebutting the misstatements.

Thus, at page 14, it says

> "1. The committee contends that the Long Island system, being predominantly intrastate in character, is not constitutionally subject to the reorganization provisions of Section 11 of the Holding Company Act (Committee Petition 24-29)."

The citation is erroneous for it should refer to pages 24-29 of our brief, not our petition, where we contend not that the Company is "predominantly intrastate in character" but "wholly" intrastate, since both by incorporation, operation, location of properties and every other test, this system is not in, nor does it affect interstate commerce.

The Commission has also deliberately avoided meeting our contention that its estimate of foreseeable income is erroneous as a matter of law, because, although allegedly based upon the future availability of natural gas, which will effect very large economies, it is actually lower in amount than the Company's actual earnings for the period before natural gas becomes available. In an attempt to conceal the fact that it cannot answer this argument, the Commission's brief makes the following misstatement of our position at page 22:

> "Equally without merit is the contention that the proceedings should be remanded because the actual earnings for 1949 have exceeded the Commission's estimate (Committee Petition, pp. 18-19)."

The Commission endeavors to make the Court believe that our claim of error is based upon a mere discrepancy between actual income and estimated income. We have endeavored to make clear that our claim of error is based not upon mere discrepancy between estimate and actuality, but upon the additional fact that actual income, without the availability of natural gas, exceeds the Commission's estimate of income after the availability of natural gas, when all parties agree that the availability of natural gas will effectuate tremendous savings. So true is this that the Commission, in its original opinion rejected an expert's opinion of estimated income because he did not give weight to the impending availability of natural gas. Historical facts now show that the Commission has made the same error for which it rejected the testimony of the expert.

Here is no mere discrepancy in amount, here actual operations have proved that the Commission's estimate does not give effect to increased income from natural gas because, before natural gas has arrived, the Company's income is greater than the Commission estimated it will be after it has been increased by the availability of natural gas.

The Commission's failure to recognize and answer this argument is an admission by silence that it is unanswerable and is sufficient, standing alone, to call for review and reversal.

Regarding the Commission's Prohibition of Solicitation for Voluntary Contributions

The Commission endeavors to expand the statutory provisions of Section 12 (e) of the Holding Company Act which vests it with authority over the solicitation of any

"proxy, power of attorney, consent, or authorization regarding any security of a registered holding company" to include a voluntary solicitation of funds by mere statement without argumentation (pp. 31, 32, Brief of Securities and Exchange Commission). It says that the need for this expansion is shown by the "evils and abuses of the use of deposit agreements in reorganization, a device closely related to the solicitation of contributions" (Commission's Brief, p. 32).

The Commission does not endeavor to show how a voluntary solicitation of contributions has been or may be abused as deposit agreements were.

With deposit agreements, the evil arose because the depositor lost the control of his security and made the depositary the judge of its own fee. No such evil exists with regard to voluntary contributions, especially in this case where there was no question of making the Committee or its counsel or accountants the judges of their own fees. Again, the Commission's refusal to meet our arguments squarely is an admission that the arguments cannot be answered. Judge Miller's dissenting opinion in the Court of Appeals for the District of Columbia, which states that if Congress had intended to vest the Commission with jurisdiction over voluntary contributions then "Congress would not have been content to describe a voluntary contribution to the expense fund of a lawful agent as a 'proxy, power of attorney, consent, or authorization' regarding a security" is the full answer to the Commission's argument.

The Commission still refuses to explain how the protective committee could have operated as efficiently without accountants, engineers, experts, and minutes of the proceedings, as it could with their assistance. Both Com-

mission and Company had such assistance, but the Committee was prohibited from obtaining it, and treated as a second-class litigant. The Commission's refusal to explain is an admission of error.

This Court should direct that writs of certiorari issue in both cases.

Respectfully submitted,

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IN THE

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No. 221

LOUIS W. GORDON, Common Stockholder of Long Island Lighting Company,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION, LONG ISLAND LIGHTING COMPANY, QUEENS BOROUGH GAS AND ELECTRIC COMPANY, NASSAU & SUFFOLK LIGHTING COMPANY,

Appellees-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

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